Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROBERT C. BALLEW,

Petitioner,

versus

UNITED STATES DEPARTMENT OF JUSTICE and UNITED STATES COAST GUARD,

Respondents.

On Petition For A Writ Of Certiorari To The Fifth Circuit Court Of Appeals New Orleans, Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUI TAM CASE
ISSUES PRESENTED

1. Does a "grave miscarriage of justice" as required in *United States v. Beggerly*, 524 U.S. 38 (1998) result when the Government in an attempt to prevent the lawful payment of the qui tam relator's portion and prevent the lawful return of the proceeds to the general fund?

2. Under the liberal rules of pleadings of the Federal Rules of Civil Procedure has Petitioner Ballew adequately pled a Rule 60(b) fraud on the court in light of the clear language in his First Amended Complaint?

LIST OF PARTIES

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United States Department of Justice, Defendant-Appellee

United States Coast Guard, Defendant-Appellee

United States of America, Defendant-Appellee

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TABLE OF CONTENTS

Page

ISSUES PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATION TO LOWER COURT OPINION 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS CITED 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 2

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 15

Appendices:

A. Opinion of the Fifth Circuit Court of Appeals ..... App. 1

B. District Court's Judgment and Order ..... App. 9

C. Order Denying Reconsideration ..... App. 15

D. Order Denying Motion for Rehearing ..... App. 17

TABLE OF AUTHORITIES

Page

CASES:

Conley v. Gibson, 355 U.S. 41 (1957) 14

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) 7

Kush v. Rutledge, 460 U.S. 719 (1983) 14

Marvin v. Trout, 199 U.S. 212 (1905) 12

United States v. Beggerly, 524 U.S. 38 (1998) 7

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 12

United States ex rel. Thornton v. Science Applications International Corp., 207 F.3d 769 (5th Cir. 2000) ..9, 11

AUTHORITIES:

United States Constitution Amendment V 1

PUBLICATION:

John Council, *Qui Tam Provisions Constitutionality Reconsidered*, TEXAS LAWYER, October 2, 2000, at page 1 12

CITATION TO LOWER COURT OPINION

Robert C. Ballew v. United States Department of Justice and United States Coast Guard, (unreported case) No. 99-11308 (decided December 15, 2000), timely filed Motion for Rehearing overruled on February 12, 2001.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to review a final decision of a court of appeals in which a decision could be had pursuant to 28 USC § 1254 and 28 USC § 2101.

CONSTITUTIONAL PROVISIONS CITED

Amendment V to the Constitution of the United States of America, which reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

This case originally was filed in the Federal District Court of Judge Terry Means, in the Northern District of Texas on June 7, 1999. On August 11, 1999, the Government filed its motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1); (b)(6). In its motion to dismiss, however, the Government did not address the fact that this case is a Rule 60(b) action in equity and based on the Government's fraud upon the court.

Ballew alerted the district court to this fact in his response. Nevertheless, on September 29, 1999, the district court, without hearing oral argument, dismissed the case for failure to state a claim. The district court subsequently denied Ballew's motion to reconsider on November 12, 1999.

The appeal was filed on November 17, 1999, and argued on October 2, 2000. The panel decision affirming the district court's dismissal was filed on December 15, 2000. The timely filed Motion for Rehearing was denied on February 12, 2001. This Petition for Writ of Certiorari has resulted.

STATEMENT OF FACTS

A. Background of The Underlying Qui Tam.

Ballew filed the Underlying *Qui Tam* on May 5, 1988. The Underlying *Qui Tam* arose out of the (i) June 14, 1979 contract between AHC and the United States Coast

Guard (the "USCG") for the production and delivery of ninety (90) "Dolphin" Short Range Recovery ("SRR") helicopters, and (ii) April 1, 1980 subcontract between AHC and Textron Lycoming Corporation ("AVCO") under which AVCO would manufacture and deliver one hundred eighty (180) engines (the "AVCO engines") to power the SRR helicopters.

As an AHC Senior Subcontract Administrator, Ballew soon discovered that the AVCO engines were grossly deficient in performance. Ballew also discovered that non-conforming parts were being incorporated into the AVCO engines, as well as being delivered as spare parts. The Underlying *Qui Tam* resulted.

B. Post-filing Activity in the Underlying *Qui Tam*.

During May 1989, one year after the Underlying *Qui Tam* was filed, and unbeknownst to Ballew at that time, the Government commenced settlement discussions with AVCO and AHC. Ballew subsequently learned about the settlement discussions during September 1989, although his requests to be involved were denied.

On February 6, 1990, the Government and AVCO (but not AHC) entered into a Memorandum of Understanding (the "MOU") to settle the case. Ballew was not a party to the MOU, nor was he involved in negotiating the MOU, provided with drafts of the MOU, or provided with a copy of the executed MOU.

The MOU, which ultimately became the basis for the final settlement agreement between the Government and AVCO, outlined the following settlement proceeds to be paid by AVCO:

> $26 million cash (plus interest);
>
> execution of a Power by the Hour ("PBTH") contract that allegedly would enable the USCG to avoid as much as $60 million in costs because it required AVCO to maintain the SRR helicopter engines and supply replacement parts for as long as six years; and
>
> execution of a "Transition Period Agreement" with the USCG for a maximum of 180 days under which, among other things, AVCO agreed to repair five (5) AVCO engines per month free of charge.

More importantly, the MOU did not outline any consideration to be paid by AHC. After the MOU was executed, the Government sought to secure Ballew's approval of the proposed settlement.

After numerous communications between Ballew and/or his lawyer and the Government did not result in Ballew's approval of the proposed settlement, the Government resorted to strong-arm tactics by threatening to oppose Ballew's claim for any share of the settlement, as well as seeking Ballew's dismissal as the Relator.

Under threat from the Government, Ballew, on June 29, 1990, executed a Waiver and Release Agreement only with respect to his claims against AVCO. Ballew, however, did not dismiss any of his claims against AHC.

On July 10, 1990, the Government filed its formal Notice of Intervention and Motion to Dismiss all claims against AHC and AVCO. The Court dismissed the Underlying *Qui Tam* on the same day pursuant to the terms of the settlement as outlined in the MOU.

C. Post-settlement Revelations.

During May 1996, when the initial six (6) year term of the PBTH contract was scheduled to expire, Ballew sent a Freedom of Information Act ("FOIA") request to the USCG for a Contract Closeout Summary. Ballew, a long time government contractor, was interested in reviewing the Contract Closeout Summary, the internal USCG contract recap document, to confirm whether the PBTH contract and Transition Period Agreement, in fact, had fixed the problems alleged in the Underlying *Qui Tam*.

Ballew also sent a FOIA request to the United States Department of Justice ("DOJ") seeking the corresponding DOJ documents analyzing the Underlying *Qui Tam* settlement. Although the DOJ initially refused to send Ballew its settlement analysis, Ballew, in December 1997, finally received a packet of documents in response to his request.

The DOJ documents revealed previously undisclosed information about the nature, extent and value of the Underlying *Qui Tam* settlement. The most pertinent document is the March 15, 1990 Memorandum for File authored by Stuart M. Gerson, Assistant Attorney General, Civil Division (the "Gerson Memorandum"), which revealed to Ballew, for the first time anywhere, that AHC also had given consideration to the Government to settle the Underlying *Qui Tam*:

> In addition, authority is granted to accept Textron's [AVCO's] offer to pay the Government $17 million (with interest from November 2, 1989) and other valuable consideration, and to

> **accept Aerospatiale's offer to dismiss administrative claims against and to grant other valuable consideration to the Government, in settlement of the above-referenced suit [the Underlying *Qui Tam*],** and to move to dismiss that suit with prejudice.

Id. (emphasis added). A true copy of the Gerson Memorandum is attached to the Petitioner's brief before the Fifth Circuit Court of Appeals.

Thus, at the same time the Government was seeking to secure Ballew's concurrence with the proposed AVCO settlement, and representing to the court, Ballew and the public at large that AHC was not guilty of any misconduct, the Government knew that it would receive additional settlement proceeds from AHC in the form of the dismissed administrative claims. The Government's failure to disclose to the court and Ballew these additional settlement proceeds, and pay Ballew his statutory share of these proceeds, has given rise to this case.

Consistent with the Gerson Memorandum, AHC and the USCG subsequently filed with the United States Department of Transportation Board of Contract Appeals a joint motion to dismiss the administrative claims. On July 24, 1990, just two weeks after the Underlying *Qui Tam* was dismissed, the final order dismissing AHC's administrative claims, totaling $26,440,130, was signed. This component of the Underlying *Qui Tam* settlement, however, never was revealed by the Government to the court or Ballew.

Based on the above post-settlement revelations, which have taken Ballew almost ten years to piece together through relentless research, FOIA requests and

FOIA request litigation, Ballew, in good faith, requested payment of his statutory share of the portion of the dismissed administrative claims fraudulently concealed from him by the Government. Ballew's request was denied. This case has resulted.

REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting the writ in this case. This Honorable Court should grant certiorari because the decision in this case conflicts with the clear holding of this Honorable Court in *United States v. Beggerly*, 524 U.S. 38 (1998) which sets out the requirements for an independent action in equity due to a "grave miscarriage of justice." In *Beggerly*, this Court underscored the special nature of the Rule 60(b) independent action in equity as a means of relief from a judgment, concluding that the remedy is available only where there has been a "grave miscarriage of justice." *Beggerly*, 524 U.S. at 46. The Supreme Court emphasized that the level of fraud or misconduct necessary to sustain an independent action under the "saving clause" of Rule 60(b) must be several notches of severity above that required for a Rule 60(b)(3) motion:

> Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of "injustices which, in certain instances, are deemed sufficiently gross to demand a departure" from rigid adherence to the doctrine of res judicata.

Beggerly, 524 U.S. at 46 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)).

The miscarriage of justice in this case is the fraud on the Court in failing to disclose the administrative claims which were intentionally negotiated in an attempt to avoid the payment to the relator for his portion of the value of the gross proceeds and to circumvent the law which provides for the payment of monies received from a *qui tam* action back into the general fund. The Government has issued memorandums which detail how the Government qui tam attorneys should attempt to negotiate separate agreements in order to keep the relator from receiving his statutory and lawful share and also so that the money will be left with the agency which allowed the fraud to occur. One of the most special and important of the reasons for this Court to grant certiorari and decide this case is the simple judicial economy which this Court's decision would invoke. The Government's attempt to circumvent the lawful payments to the relator in qui tam cases has caused considerable litigation by relators who discover that they were not paid for the benefits and proceeds repaid to the Government and the agencies involved. Justice Edith Jones decided this case but before she did, she expressed her displeasure with qui tam litigants who file the suits and keep litigating the actions for year after year after year. SEE: *Texas Lawyer*, "Counsel at Fifth Circuit Debate Supreme Court's Ruling's Effect on Qui Tam Litigation" by John Counsel. The litigation, for the most part is an attempt by qui tam litigants to obtain their fair share of the in-kind awards negotiated by the Government and hid from the relators in order to deprive them of the award and to keep the monies from returning to the treasury. The Fifth Circuit Court of Appeals has recognized that these savings or

in-kind benefits are "proceeds" within the meaning of the qui tam statute. *United States ex rel. Thornton v. Science Applications International Corp.*, 207 F.3d 769 (5th Cir. 2000). A final and definitive pronouncement by this Court that the alternative, in-kind benefits are in fact "proceeds" within the meaning of the statute would either abolish the end around of the statute which requires the sharing of funds or would decide that the benefits were outside the statute and end the attempts by qui tam relators to collect more.

This Honorable Court should also dispose of the apparently conflicting opinions dealing with whether or not in-kind consideration, in this case, "power-by-the-hour" agreements and the waived claims whereby the offending company agrees to provide valuable services to the Government as restitution without payment or for greatly reduced payment for the services and the companies gave up valuable claims against the Government in settlement of the lawsuit are in fact "proceeds" within the meaning of the statute. The Fifth Circuit directly held that such benefits are "proceeds" within the meaning of the statute. *United States ex rel. Thornton v. Science Applications International Corp.*, 207 F.3d 769 (5th Cir. 2000). The *Thornton* case goes further and holds that the Government has an affirmative duty to advise qui tam relators of the value of all non-cash proceeds included in a qui tam settlement and to include those sums in the final payment to the relator. Mr. Thornton was lucky to find out about the arrangements before his time for finalizing the settlement was finished. The Government takes an active role in hiding these beneficial, financially rewarding contracts from the relators. In this case, the Government hid over $26 million from the Petitioner. The Petitioner could not

have discovered this shortage because of the fraud and intrigue of the Government. The Government refused to let Judge Mahon know the truth so that a proper determination of the adequacy and fairness of the award could be decided.

The Government's constant and dedicated effort to subvert the Congress' intent to have a relator awarded at least the minimum portion of all the proceeds received from the efforts of the qui tam relator needs direction and correction. If there is nothing wrong with the Justice Department's activity in this regard, then it should be brought out for all to see and consider and not be conducted in the cloak and dagger manner these undercover negotiations are presently conducted. This Court's decision determining the meaning of "proceeds" will go a long way toward achieving that honorable state.

The second and final special and important reason for granting the writ is to determine whether the pleadings in Petitioner Ballew's First Amended Complaint are sufficient to plead a Rule 60(b) fraud upon the court. The Complaint in its basic form shows that the Petitioner is seeking to right a wrong perpetrated upon the court by the Government's fraudulent concealment of the true value of the entire settlement. This fraud was upon Mr. Ballew and the true value of his portion of the recovery, but as well it was a fraud upon the very Government the Justice Department represents. Without the relator coming forth and notifying the Justice Department of the wrong and in fact carrying the burden of the litigation for the most part in the early stages, the wrong would never be righted. Mr. Ballew came back into court to seek to remedy a grave miscarriage of justice and his pleadings

adequately plead that equitable action. This Honorable Court should so find. This Honorable Court should grant certiorari and either grant a full hearing hereon or in the alternative, find that this case is ripe for disposition and grant a summary reversal.

I.

Does a "grave miscarriage of justice" as required in *United States v. Beggerly*, 524 U.S. 38 (1998) result when the Government in an attempt to prevent the lawful payment of the qui tam relator's portion and prevent the lawful return of the proceeds to the general fund?

The Fifth Circuit Court of Appeals in this case emphasized that the Petitioner had received a large sum of money in the initial settlement. (Opinion, pp. 2-3) In addition, the Court erroneously found that "Ballew has shown injury to himself in his capacity as a 'single litigant' but this alone is not sufficient to constitute fraud on the court." (Opinion, p. 9) The grave miscarriage of justice is the consistent effort of the Justice Department to short qui tam litigants on the amount of money that Congress determined is their entitlement. The Government litigation tactics in this case are akin to the litigation tactics taken in all other qui tam cases. As evidence, the Government has shorted or attempted to short the qui tam litigant Mr. Pete Thornton as evidenced by the case of *United States ex rel. Thornton v. Science Applications International Corp.*, 207 F.3d 769 (5th Cir. 2000). Litigation by qui tam relators who find that the Government has omitted some of the "proceeds" in computing their share

of damages is widespread. SEE: John Council, *Qui Tam Provision's Constitutionality Reconsidered*, TEXAS LAWYER, October 2, 2000, at page 1.

The Allegations in this case clearly deal with the private attorney general status of a qui tam litigant. The qui tam litigant, as established by Congress, acts on behalf of the people of the United States and for the Government to protect its interests and rights. SEE: *Marvin v. Trout*, 199 U.S. 212 at 225, 26 S.Ct. 31 at 34, 50 L.Ed. 157; *United States ex rel. Marcus v. Hess*, 317 U.S. 537 at 546, 63 S.Ct. 379 at 385, 87 L.Ed. 443. As such, any fraud on the litigant is a fraud on the Court and the Government. Additionally, the trial court is required to make a fairness determination and when the trial court has been given no information on the missing data that function is impossible.

Although the Fifth Circuit Court of Appeals addresses the issue as the greedy litigant, Petitioner is requesting only that he be given a hearing to prove his proper share of the $26 million of dismissed administrative claims based upon the waived administrative claims that resulted from the qui tam action filed by Petitioner Ballew but which was never disclosed or considered in the funds he received. Although the Court of Appeals mentions that the Petitioner was seeking 15% of "$327,940,130" but as evidenced by the oral arguments before the Fifth Circuit the Petitioner was only seeking to prove the $26 million sum which was never disclosed. The entire reason for Congress providing the 15 to 25 per cent litigant's fee is to encourage and not discourage people to file these claims on behalf of the Government and to retrieve the sums for the people and to help catch

and eliminate fraud in Government contracts. The plan has worked well with qui tam litigants saving the Government literally hundreds of millions of dollars in cash, waivers of claims, and in-kind proceeds.

The relevant facts establish the true nature of the Government's consistent conduct as used not only in Mr. Ballew's case but in the numerous other cases involving qui tam litigants.

This Honorable Court should grant certiorari and determine if the Petitioner and the many other qui tam litigants can collect on the Government's fraudulently concealed proceeds.

II.

Under the liberal rules of pleadings of the Federal Rules of Civil Procedure has Petitioner Ballew adequately pled a Rule 60(b) fraud on the court in light of the clear language in his First Amended Complaint?

Under the liberal pleading rules of the Federal Courts, the Petitioner's First Amended Complaint states a cause of action. This Honorable Court noted in several opinions:

> "The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is

> made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41 at 47-48, 78 S.Ct. 99 at 102-103, 2 L.Ed.2d 80 (1957); as cited in *Kush v. Rutledge*, 460 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983).

The *Conley* Court noted that "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41 at 45-46, 78 S.Ct. 99 at 100-101, 2 L.Ed.2d 80 (1957); as cited in *Kush v. Rutledge*, 460 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983).

The Opinion of the Fifth Circuit ignores these basic pleading rules which clearly allow the Petitioner to continue with his case and allow discovery to supplement any deficiency in the notice of the pleadings.

This Honorable Court should grant Certiorari, reverse the dismissal of the Complaint and allow a trial on the merits. Petitioner will be able to prove his case.

CONCLUSION

The Court should grant the Writ and address these two important issues of federal constitutional and statutory law.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11308

Robert C. Ballew,

Plaintiff-Appellant,

versus

United States Department of Justice and
United States Coast Guard,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
Civil Docket #4:99-CV-406-Y

(Filed Dec. 15, 2000)

Before JOLLY, JONES, and SMITH, Circuit Judges.

EDITH H. JONES*, Circuit Judge:

Robert C. Ballew ("Ballew" appeals from the district court's grant of a motion to dismiss for failure to state a claim on his Federal Rule of Civil Procedure 60(b) independent equitable action for relief from a final judgment. Because Ballew did not plead the sort of "grave miscarriage of justice" required to sustain a Rule 60(b) independent equitable action for relief from a final judgment, we now affirm the district court's dismissal of his claim.

---

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

In 1988 Ballew filed a *qui tam* lawsuit under the Federal False Claims Act against his then-employer, Aerospatiale Helicopter Corporation "AHC") and the Textron Lycoming Division of AVCO Corporation ("AVCO" These two defense contractors were engaged in the production and maintenance of the HH65-A "Dolphin" helicopter for the Coast Guard. Ballew's *qui tam* action revealed that the engines made by AVCO for use in the AHC-manufactured helicopter were defective. As relator of an action brought on behalf of the government, Ballew was entitled to receive a share of any recovery obtained by the government. The Department of Justice ultimately intervened in Ballew's *qui tam* action and settled the case on July 10, 1990

As part of the settlement, the Government agreed to give Ballew, in his capacity as relator, a 15% share of the cash recovery, or a total payment of $2,685,861.90. In return for this large cash payment, Ballew consented to the dismissal of his *qui tam* lawsuit against AVCO and AHC. The district court approved the proposed settlement, stating that "the Settlement Agreement between the Parties provides fair, adequate and reasonable resolution of this case under all the circumstances.

Ballew received his nearly $2.7 million payment shortly after the July 10, 1990 settlement was reached, and the matter was considered closed. However in June 1999, nearly nine years later, Ballew returned to federal court, asserting that he received a sum far below that to which he was entitled.

In the instant case, Ballew asserts that the Government fraudulently concealed critical elements of the settlement agreement with AVCO and AHC, disguising the fact that the Government actually received some $327,940,130 in valuable consideration. Ballew therefore contends that he is entitled to 15% of $327,940,130, rather than the 15% of $17.9 million that he actually received.

Ballew arrived at this much larger settlement figure based on several documents he obtained via the Freedom of Information Act between 1996 and 1998. Ballew claims that the *qui tam* settlement to which he agreed in 1990 failed to give him his 15% cut of (1 the new engine maintenance "Power by the Hour" contract entered into between AVCO and the Government as part of the settlement and (2) the settlement of certain administrative claims between the Coast Guard and AHC, which settled several weeks after his own underlying *qui tam* action.

The district court granted the Government's motion to dismiss Ballew's Rule 60(b) independent action for failure to state a claim. The district court ruled that Ballew had failed to plead the sort of "grave miscarriage of justice" required to sustain an independent equitable action under the "Savings Clause" of Rule 60(b) and that any motion allowed under Rule 60(b) was untimely. Ballew now appeals the dismissal of his Rule 60(b) claim.

This Court's review of the district court's grant of the Government's motion to dismiss for failure to state a claim is *de novo Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66 (1978); *Fontana v. Barham*, 707 F.2d 221, 227 (5th Cir 1983). The Government has argued that we should review the district court's decision in this case for abuse

of discretion. The Government's argument is premised on the rule that dismissal of Rule 60(b) motions seeking relief from final judgment is subject only to abuse of discretion review. The Government's argument is correct as far as it goes: Rule 60(b)(1)-(6) motions are directed to the sound discretion of the district court. *See e.g. Behringer v. Johnson,* 75 F.3d 189, 190 (5th Cir. 1996), *cert. denied* 516 U.S. 1182 (1996); *Bertrand v. Sullivan,* 976 F.2d 977, 980 (5th Cir. 1992) However, the instant action does not concern a Rule 60(b) motion but rather an independent action pursuant to the "Saving Clause" of Rule 60(b). *See* 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Proceedure* § 2868 (2d ed. 1986). An action pursuant to the "Saving Clause" is a free-standing claim in equity, not a mere motion, and is thus subject to *de novo* review on appeal when dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

"Saving Clause" reads in relevant part that "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment [or] order." Fed. R. Civ. Pro. 60(b). This independent action sounds in equity and is subject to the standard equitable defenses, including laches.

Supreme Court has recently underscored the special nature of the Rule 60(b) independent equitable action as a means of relief from a judgment, concluding that the remedy is available only where there has been "grave miscarriage of justice." *United States v. Beggerly,* 524 U.S. 38, 46, 118 S.Ct. 1862, 1868 (1998). The Supreme Court emphasized that the level of fraud or misconduct necessary to sustain an independent action under the "Saving

Clause" of Rule 60(b) must be several notches of severity above that required for a 60(b)(3) motion:

> If relief may be obtained through an independent action in a case such as this, where the most that may be charged against the government is a failure to furnish relevant information that would at best form the basis for a Rule 60(b)(3) motion, the strict 1-year time limit on such motions would be set at naught. Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of "injustices which, in certain instances, are deemed sufficiently gross to demand a departure" from rigid adherence to the doctrine of res judiciata.

Beggerly, 524 U.S. at 46, 118 S.Ct. at 1867 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 64 S.Ct. 997, 1000 (1944).[1] Thus, the bar has been set high for Ballew's Rule 60(b) independent action: it must work a "grave miscarriage of justice" to allow the settlement in the original *qui tam* action to stand.

---

[1] As *Beggerly* suggests, Rule 60(b)(3) would be directly applicable to Ballew's alleged situation, permitting relief "from a final judgment . . . [because of] fraud . . . misrepresentation, or other misconduct of an adverse party," but by waiting over nine years to assert that the Government committed fraud in entering into the underlying *qui tam* settlement, Ballew lost the option of bringing a 60(b)(3) motion. Similarly, to the extent Ballew's allegations might have supported relief based on Rule 60(b)(1) ("mistake, inadvertence, surprise, or excusable neglect"), or Rule 60(b)(2) (newly discovered evidence), they are also time-barred.

In his attempt to show the requisite "grave miscarriage of justice" Ballew focuses on the failure of the government to give him a share, in his capacity as relator, of the estimated value of the later-settled "Power by the Hour" maintenance contract or of the resolution of the administrative claims between AHC and the Coast Guard. Ballew's brief implies that this exclusion was motivated by malice, misrepresentations and fraudulent concealment on the part of the Department of Justice and/or the Coast Guard; but the *qui tam* award that he did receive was, at the time, the largest-ever. It is also undisputed that he was aware of the government's negotiations over the Power by the Hour contract at the time of the settlement, and he was vigorously represented by counsel during settlement negotiations. Put together, these circumstances do not rise to the level of a grave miscarriage of justice even if the government was not fully forthcoming to Ballew.

Ballew also attempts to satisfy the grave miscarriage of justice standard by claiming that he is the victim of fraud by the Government, which allegedly made misrepresentations and withheld information during the settlement negotiations in 1990. Accepting these allegations as true, Ballew has still not made out a claim there has been the sort grave miscarriage of justice contemplated by the Supreme Court. Even prior to *Beggerly* it was established that "fraud cognizable to maintain an untimely independent attack upon a valid and final judgment has long been regarded as requiring more than common law fraud." *Geo. P. Reintjes Co. v. Riley Stoker Corp.*, 71 F.3d 44, 48 (1st Cir. 1995). *Beggerly* itself held that the failure of the Government to "thoroughly search its records and make

full disclosure to the Court" was insufficient to sustain a Rule 60(b) independent action. *Beggerly*, 524 U.S. at 47, 118 S.Ct. 1868.

Ballew's only other argument that there has been a grave injustice is bound up with his assertion that "fraud on the court" was committed by the Government. Fraud on the court, if established, constitutes a grave miscarriage of justice and may serve as the foundation of a Rule 60(b) independent action. *Rozier v. Ford Motor Company*, 573 F.2d 1332, 1338 (5th Cir. 1978). But the standard for fraud on the court is demanding: "Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court." *Id.* at 1338 (citing to *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997 (1944). Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court. *Id.* at 1338 (citing to *Kupferman v. Consolidated Research & Mfg. Co.*, 459 F.2d 1072 (2nd Cir. 1972). Where the wrong is only between the parties and there has been no direct assault on the integrity of the judicial process itself, the federal courts have refused to invoke the doctrine of fraud on the court. *See* 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2870 at 416 (2d. ed. 1987). Stated another way, fraud on the court requires a "scheme by which the integrity of the judicial process has been fraudulently subverted by a deliberately planned scheme in a manner involving 'far more than an injury to a single litigant.' " *Addington v. Farmer's Elevator Mutual Insurance*, 650 F.2d 663, 668 (5th Cir. 1981 (quoting

Hazel-Atlas Glass, 322 U.S. 238, 245-46, 64 S.Ct. 997, 1002 (1944).

Ballew asserts that the fraud on the court in the instant case occurred when "the DOJ attorneys conspired with the USCG (and the defendants in the underlying *Qui Tam*) to mislead the court as to the true nature, extent and value of the underlying *Qui Tam* settlement proceeds." Taking all of these assertions as true Ballew has only established that the Government committed fraud against him *as an individual*. Ballew has shown injury to himself in his capacity as a "single litigant" but this alone is not sufficient to constitute fraud on the court. Ballew has failed to allege an attack on the integrity of the judicial process itself. By failing to plead fraud on the court, Ballew has thereby failed to assert that a grave miscarriage of justice exists.

Ballew has failed to plead any grave miscarriage of justice. In the absence of a grave miscarriage of justice, a Rule 60(b) independent action can not be sustained. The district court's dismissal of Ballew's action for failure to state a claim is therefore **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT C. BALLEW	§	
VS.	§	CIVIL ACTION
	§	4-99-CV-406-Y
UNITED STATES	§	
DEPARTMENT OF	§	
JUSTICE, ET AL.	§	

FINAL JUDGMENT

(Filed Sep. 30, 1999)

Pursuant to the order issued this same day, and Federal Rule of Civil Procedure 58,

It is hereby ORDERED, ADJUDGED, and DECREED that all claims in the above-styled and numbered cause are DISMISSED WITHOUT PREJUDICE. All costs under 28 U.S.C. § 1920 shall be borne by Plaintiff.

SIGNED September 29, 1999.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT
JUDGE

TRM/val

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT C. BALLEW	§	
VS.	§	CASE NO.
	§	4-99-CV-406-Y
UNITED STATES	§	
DEPARTMENT OF	§	
JUSTICE, ET AL.	§	

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(Filed Sep. 30, 1999)

Pending before the Court is Defendants United States Department of Justice and United States Coast Guard's Motion to Dismiss, filed August 11, 1999. After careful consideration of the briefs, affidavits, and other materials submitted in this case, the Court finds that Defendants' motion should be GRANTED.

I. FACTS

Plaintiff, Robert C. Ballew, filed this action pursuant to Federal Rule of Civil Procedure 60(b), which, *inter alia*, permits a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The judgment from which Plaintiff seeks relief stems from a settlement agreement that took place almost a decade ago.

In 1998, Plaintiff filed a lawsuit under the False Claims Act against two defense contractors who had sold

defective helicopter engines to the United States Coast Guard. His claim was filed under a provision of the False Claims Act that authorizes private persons to file *qui tam* lawsuits on behalf of the Government and receive a share of the Government's recovery. *See* 31 U.S.C. § 3730(d). During the course of the proceedings, the Government negotiated a settlement with the *qui tam* defendants, who agreed to pay the government $17 million. Plaintiff received a statutory share of $2.7 million, 15 percent of the cash payment resulting from the settlement agreement. Plaintiff's recovery of this sum in 1990 was widely publicized because it was the largest payment awarded to a relator in the 127-year history of the False Claims Act.

Plaintiff now alleges that he received a sum well below that to which he was entitled. He claims that the Government fraudulently concealed critical aspects of the settlement agreement and thereby failed to disclose that it actually received consideration in the amount of $327,940,130 by its agreement to settle the *qui tam* lawsuit. Plaintiff bases these allegations on a number of government documents he requested and received under the Freedom of Information Act between 1996 and 1998. He asserts that this Court has jurisdiction to hear his claim as an independent action in equity under Rule 60(b). Defendants filed this motion to dismiss for lack of subject matter jurisdiction under Rule 12(b) (1) and failure to state a claim upon which relief can be granted under Rule 12(b) (6).

II. RULE 60(b)

Rule 60(b) of the Federal Rules of Civil Procedure is the only means of obtaining relief from a judgment. *See United States v. Beggerly*, 118 S. Ct. 1862 (1998). Under Rule 60(b) (1)-(3), a party may file a motion for relief from a final judgment based on mistake, fraud, or newly discovered evidence "not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b). Plaintiff does not dispute that a motion under this provision is time-barred. Rather, Plaintiff relies on the "saving clause" of Rule 60(b), which provides that "this rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment . . . or to set aside a judgment for fraud upon the court." Fed R. Civ. P. 60(b).

In *Beggerly*, the Supreme Court held that Rule 60(b) preserves the equitable remedy of an "independent action" to set aside a judgment when all other possible claims under Rule 60(b) are time-barred. However, the Court emphasized that the grounds for bringing an independent action based on fraud under Rule 60(b) must exceed the same grounds available under Rule 60(b) (3). Otherwise, "the strict 1-year time limit on such motions would be set at naught." 118 S. Ct. at 1867. Consequently, the court held that an independent action for relief from a prior judgment is available "only to prevent a grave miscarriage of justice." *Id.* at 1868. "Independent actions must . . . be reserved for those cases of injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata." *Id.* at 1867 (internal citations omitted).

III. PLAINTIFF'S CLAIM

The Court is not persuaded that Plaintiff's alleged "injury" rises to the level of a "grave miscarriage of justice" as contemplated by the Supreme Court in *Beggerly*. In that case, the Court held that the claimants were not entitled to bring an independent action to set aside a settlement agreement based on their contentions that the government had failed to thoroughly search its records and make full disclosures to the court regarding a previous grant of disputed property to a private landowner. The Court, however, provided an example of a situation that did warrant an independent action because judgment had been entered against the petitioner as a result of a forged document. *Id.* at 1867 (citing *Marshall v. Holmes*, 12 S. Ct. 62 (1891)).

At least two district court cases have applied *Beggerly* to claims similar to that of Plaintiff, and both held that "something more than common law fraud" must be shown in order to meet the heightened standard for an independent action under Rule 60(b). *See Porter v. Chicago School Reform Board of Trustees*, 1999 WL 627384 (N.D. Ill.) (dismissing complaint of teacher who asserted that school board engaged in fraud when it misrepresented her position in settlement negotiations, resulting in proceeds less than that to which she was entitled); *Lehman Bros. v. Masselli*, 1998 WL 53181 *6 (S.D.N.Y.) ("Far more than an injury to an individual litigant, [fraud on the court] embraces that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases presented for adjudication").

In the present case, Plaintiff hardly can assert that his recovery of $2.7 million dollars as a relator in a claim under the False Claims Act constituted a "grave miscarriage of justice." No judgment was entered against Plaintiff, nor was he penalized in any way as a result of the court's acceptance of the settlement agreement. Even if he would have recovered a substantially larger sum but for the government's alleged fraud, Rule 60(b) provided him with an opportunity to file a motion within one year of the dismissal of the *qui tam* action. Plaintiff himself admits that he strongly suspected that the government was misrepresenting facts about the settlement during the negotiation process, and that he received a copy of the actual settlement agreement within one year of the final judgment.

Therefore, it is ORDERED that Defendants' Motion to Dismiss is GRANTED. All costs of court shall be borne by Plaintiff.

Further, it is ORDERED that the above-styled and numbered cause be UNSEALED in accordance with the requests of all parties.

SIGNED September 29, 1999.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/val

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT C. BALLEW	§	
VS.	§	CIVIL ACTION
	§	NO. 4:99 CV-406 Y
UNITED STATES	§	
DEPARTMENT OF JUSTICE,	§	
ET AL.	§	

ORDER DENYING MOTION TO RECONSIDER
(Filed Nov. 15, 1999)

Pending before the Court is Plaintiff's Motion to Reconsider Dismissal of the Case, filed October 12, 1999 [doc. # 21-1]. Having carefully considered the motion, the Court finds that it should be DENIED.

A motion for reconsideration must be based either upon Federal Rule of Civil Procedure 59(e), providing for a motion to alter or amend judgment, or upon Rule 60(b), providing for a motion for relief from judgment. *See School Dist. No. 1J, Multnomah County v. AC and S, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993); *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990). Both rules have been interpreted to allow reconsideration on specific grounds and a party may not simply rehash arguments made during the original consideration of the motion nor assert new arguments that could have been made at the time of the original filings on the point. *See Lavespere*, 910 F.2d at 173; *Waltman v. International Paper Co.*, 975 F.2d 468, 473-74 (5th Cir. 1989). In the present case, Plaintiff bases his motion upon Rule 59(e).

Except under "highly unusual" circumstances reconsideration under Rule 59(e) "is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Multnomah County*, 5 F.3d at 1263. A Rule 59(e) motion must be filed within 10 days of the entry of judgment. *See* Fed. R. Civ. P. 59(e).

Here, Plaintiff has neither cited controlling legal authority nor alleged new evidence in support of his claim that *reconsideration* is warranted under these circumstances. The requirements of Rule 59(e) have not been met. Therefore, Plaintiff's motion for reconsideration is DENIED.

SO ORDERED.

SIGNED November 12, 1999.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/val

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No 99-11308

U. S. COURT OF APPEAL
FILED
FEB 12 2001

ROBERT C BALLEW

Plaintiff-Appellant

CHARLES R. FULBRUGE III
CLERK

UNITED STATES DEPARTMENT OF JUSTICE;
UNITED STATES COAST GUARD

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

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ON PETITION FOR REHEARING EN BANC

(Opinion 12/15/00, 5 Cir F.3d

Before JOLLY, JONES, and SMITH, Circuit Judges.

PER CURIAM

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. App. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. THe court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. App. P. and 5th CIR. R.35) , the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

Edith H. Jones
United States Circuit Judge